No. 91-17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE ESTATE OF FLOYD COWART

Petitioner,

v.

NICKLOS DRILLING COMPANY, and
COMPASS INSURANCE COMPANY

Respondents.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit**

REPLY BRIEF FOR PETITIONER

LLOYD N. FRISCHHERTZ, ESQ.
SEELIG, COSSE', FRISCHHERTZ
& POULLIARD
1130 St. Charles Avenue
New Orleans, LA 70130
Telephone: (504) 523-1227
Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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ARGUMENT

1. Extent of Argument.

Due to the overwhelming response Petitioner's argument has garnered in the captioned matter, it is felt that a response to some of the arguments levied in opposition is in order. This reply will be limited to responding to the arguments propounded in the brief of the Federal Respondent, the amicus brief of Petroleum Helicopters, Inc. and American Home Assurance Company (Amicus PHI), and the amicus brief of National Association of Stevedores, Shipbuilder's Council of American, Inc., Master Contracting Stevedore Association of the Pacific Coast, Inc., The Alliance of American Insurers, and Signal Mutual Indemnity Association, Ltd. (Amicus NAS). The argument proposed by Respondent Nicklos Drilling Company and Compass Insurance Company does nothing more than reiterate its argument before the lower courts, i.e., total reliance on the United States Court of Appeals decision in *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644 (5th Cir. 1986). As the *Collier* decision, and its alleged applicability to the captioned matter, has been discussed in detail in Petitioner's Brief on the Merits (Pet.Br., p. 26-28), it need not be re-argued here. Suffice it to say that the facts of Collier are easily distinguishable from the facts of the captioned matter, and that decision is therefore totally reconcilable with Petitioner's position.

By contrast, Federal Respondent, Amicus PHI and Amicus NAS, all introduce new arguments concerning the interpretation of Section 33(g). As these arguments were not specifically addressed in Petitioner's Brief on the Merits, they will be addressed here. Since

the arguments propounded by all of these entities is substantially the same, this reply will address them collectively as "Opposition Argument".

2. Identification of parties.

First, however, Petitioner submits that certain confusing elements should be cleared up prior to the oral argument in this matter. While this matter was being heard before the lower courts, briefs were filed in support of Petitioner's position by Robert P. Davis, Carol A. De Deo, and Joshua T. Gillelan, II, as attorneys for the Director, Office of Worker's Compensation Programs. Before this Court, briefs have been filed by Marshall J. Breger, Allen H. Feldman, Steven J. Mandel and Edward R. Sieger, as attorneys for "Federal Respondent". Since the brief before this Court does not state that the above persons are representing the Director, OWCP, and said brief presents an argument completely inapposite of the argument submitted in the Director's brief before the Fifth Circuit, Petitioner admits confusion as to whether the "Federal Respondent" is advancing the position of the Director, OWCP, or whether it is advancing the position of some other federal agency. This confusion is heightened by the fact that Chapter 3-600, paragraph 9 of the Longshore Procedure Manual (a manual promulgated by the Director, OWCP, for use by OWCP personnel) states:

> "The term entitled to compensation has been interpreted to mean that the employee is being paid by the EC either voluntarily or pursuant to an award of compensation. If the employee is not receiving compensation, Section 33(g)(2) merely requires that the employee give the employer notice of the settlement. . ."
>
> (Supp. App. 1).

As the view promulgated by the Director, OWCP's Procedure Manual is the exact argument that Petitioner has advanced in its Brief on the Merits, and the exact opposite of the argument propounded in the brief of the "Federal Respondent", Petitioner questions whether the "Federal Respondent" is propounding a view of the Director, OWCP which is inapposite to the Director's own enforcement guidelines, or whether the "Federal Respondent" is indeed representing the views of some other federal agency.

The importance of this determination is twofold. First, the Director, OWCP is the only federal agency that is a party in the captioned matter. Thus, if "Federal Respondent" is not representing the views of the Director, OWCP, then this party is indeed not a respondent, but rather an amicus party. In that case, as an amicus, "Federal Respondent" would not be allowed to participate in oral argument of this matter on March 25, 1992. Second, this determination is important to determine the weight to be given to the "Federal Respondent's" argument. The Director, OWCP, by virtue of its being charged with the administration of the LHWCA, is given deference to its interpretation of the Act's provisions. See e.g., *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1046 and n. 23 (5th Cir. 1982); *Chemical Manufacturers Association v. NRDC*, 470 U.S. 116, 125-126 (1985). Any other federal agency is not entitled to such deference.

If this Court determines that "Federal Respondent" does indeed represent the view of the Director, OWCP, and therefore is entitled to participate in oral argument, and is entitled to deference, an interesting

question arises. Because this scenario would suggest two inapposite views of the same agency, one view propounded by "Federal Respondent" in its brief on this matter, and the other view propounded by the Director for the last sixteen years, the question arises as to which view should be given deference. This Court has held that an agency's interpretation "which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view". *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30, 107 S.Ct. 1207, 1221 n. 30 (1987). Thus, even if "Federal Respondent" is deemed to be propounding the views of the Director, OWCP, it is respectfully submitted that deference is not due to this new view, but rather deference is due to the Director's longstanding interpretation as outlined in the Longshore Procedure Manual, *supra*.

3. The logical interpretation.

As noted earlier, the argument presented by Federal Respondent, Amicus PHI, and Amicus NAS (Opposition Argument), is substantially the same; only the extent of the argument presented by the various entities differs. This Opposition Argument can be summarized as follows.

Section 33(g)(1) and 33(g)(2) operate together. 33(g)(1) requires that the claimant obtain written approval of a third party settlement any time such settlement is for an amount less than the compensation to which the claimant would be entitled to under the Act. (Fed. Resp. Br. p. 18). 33(g)(2) requires that a claimant give notice to the employer any time such settlement is for an amount greater than the compensation to which the claimant would be entitled to under the Act. *Id.*

While the above argument certainly appears to be a valid alternative to Petitioner's interpretation of Section 33(g), on second glance, it has the same flaw which petitioner addressed in this Brief on the Merits (Pet. Br. pp. 20-21), i.e.; if this is the interpretation that Congress intended, why did they make Section 33(g)(2) disjunctive. Under the opposition argument, Section 33(g)(2) would be rewritten as follows:

> If no written approval of the settlement is obtained and filed as required by paragraph (1) all rights to compensation and medical benefits under this chapter shall be terminated regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Chapter
>
> *or*
>
> If the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Chapter shall be terminated, regardless of whether the employer or employer's insurer has made payments or acknowledged entitlement to benefits under this Chapter.

Since the "written approval of the settlement . . . required by paragraph (1)" is required when a "person entitled to compensation" enters into a settlement with a third person, and since the Opposition Argument suggests that the phrase "person entitled to compensation" refers to any employee, then this interpretation is clearly redundant. This interpretation would mean that 33(g)(2) requires that all employees who do not obtain written approval when they

settle with a third person for less than their compensation entitlement are prohibited from receiving benefits *or* all employees who fail to notify the employer of a third party settlement are denied benefits. It is illogical to state that all claimants who fail to obtain written approval of a third party settlement, *or* all claimants who fail to give notice of a third party settlement, are denied benefits. Surely, Opposition Argument cannot suggest that a claimant could obtain written approval of a third party settlement without giving the employer notice of said settlement.

The only possible way the opposition argument would be logical, would be if the second disjunctive portion of Section 33(g)(2) applied only to those cases where a claimant settled with a third party for more than the compensation to which the claimant would be entitled to under the Act. If 33(g)(2) stated this, than the disjunctive wording of 33(g)(2) could be reconciled with the Opposition Argument because the first disjunctive portion would require written approval of settlements for less than the compensation entitlement, and the second disjunctive portion would require notice be given of settlements for greater than the compensation entitlement.

However, the second disjunctive portion of 33(g)(2) applies "if the employee fails to notify the employer of *any* settlement. . ." Given, as this Court has suggested, that the judiciary should give effect to every word Congress used (See e.g. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *U.S. v. Menasche*, 348 U.S. 528, 538-539 (1955)), and given that Congress chose in enacting Section 33(g)(2) to make that statute disjunctive, it would be illogical for the Court to accept Opposition Argument's interpretation. The

only way that the disjunctive nature of 33(g)(2) makes sense is to interpret the phrase "person entitled to compensation" in 33(g)(1) as meaning something different than the term "employee" in 33(g)(2). The Administrative Law Judges and the Benefits Review Board *have* given the phrase "person entitled to compensation" a different meaning than "employee" and Petitioner respectfully submits that this is the only interpretation by which the disjunctive nature of 33(g)(2) makes sense.

Furthermore, even if this Court chose to ignore the language in the second disjunctive portion of Section 33(g)(2), the Opposition Argument would still be illogical. Remember, the Opposition Argument applies 33(g)(1) to settlements for less than the compensation entitlement, and applies 33(g)(2) to settlements for greater than the compensation entitlement. (Fed. Resp. Br. p. 18). Since 33(f) of the Act states that the employer is only liable for compensation benefits due in excess of the third party settlement, then the employer has no exposure if the claimant settles for greater than the compensation entitlement. How could Congress intend that 33(g)(2) would terminate a claimant's right to compensation benefits if the claimant settled for more than the compensation entitlement without giving notice, when the claimant who settles for more than the compensation entitlement is not due any compensation benefits from the employer pursuant to 33(f).

4. The historical interpretation.

Federal Respondent makes an interesting point that Petitioner's interpretation of "person entitled to compensation"makes no sense under Section 33(g) as enacted in 1927 because, at that time, claimant had to

elect whether to sue a third party in tort or to collect compensation under the Act, but not both. (Fed. Resp. Br. p. 20). Federal Respondent notes that because of the election process, a claimant could not be receiving compensation while he was suing a third party. *Id.* Where Federal Respondent's argument is flawed is that it suggests that Petitioner defines "person entitled to compensation" as only a person who is actually receiving compensation. This is not what Petitioner's argument says. Petitioner defines "person entitled to compensation" as a person to whom the employer has acknowledged compensation liability. *O'Leary* and its progeny determined that a good benchmark to use in determining when an employer has acknowledged compensation liability is when the employer is either actually paying compensation benefits or has been judicially ordered to pay compensation benefits.[1] *O'Leary* and its progeny are clearly

[1] See eg. *O'Leary v. Southeast Stevedore Company*, 5 BRBS 161 (ALJ, 1976), 7 BRBS 144 (1977), *aff'd. mem.* 622 F.2d 596 (9th Cir. 1980)(unpublished); *Caranante v. International Terminal Operating Company, Inc.*, 7 BRBS 248 (1977); *Wall v. Wall*, 15 BRBS 197 (ALJ, 1982); *Kahny v. Arrow Contractors of Jefferson, Inc.*, 15 BRBS 212 (1982), *aff'd. mem.* 729 F.2d 757 (5th Cir. 1984)(unpublished); *Todd v. J & M Welding Contractors*, 16 BRBS 434 (ALJ, 1984); *Wilson v. Triple A Machine Shop*, 17 BRBS 471 (ALJ, 1985); *Lindsay v. Bethlehem Steel Corporation*, 18 BRBS 20 (1986), 22 BRBS 206 (1989); *Dorsey v. Cooper Stevedoring Company, Inc.*, 18 BRBS 25 (1986); *Nesmith v. Farrell American Station*, 19 BRBS 176 (1986); *Cernousek v. Braswell Shipyards, Inc.*, 19 BRBS 796 (ALJ, 1987); *Quinn v. Washington Metropolitan Area Transit Authority*, 20 BRBS 65 (1986); *Lewis v. Norfolk Shipbuilding and Dry Dock Corporation*, 20 BRBS 126 (1987); *Evans v. Horne Brothers, Inc.*, 20 BRBS 226 (1988); *Mobley v. Bethlehem Steel Corporation*, 20 BRBS 239 (1988), *aff'd.* 24 BRBS 49, 920 F.2d 558 (9th Cir. 1990); *Blake*

in accord with the intent of Section 33(g) as it was enacted in 1927, as will be discussed infra.

To understand how 33(g) fit into the original enactment of the Act, it is necessary to identify the potential claimants who could be injured in a work accident. The first type of claimant would be the person who is injured on the job but is not entitled to compensation. Two situations immediately come to mind; (1) the claimant who contracts an occupational disease such as asbestosis but is not currently disabled, and (2) the claimant who suffers a non-disabling injury on the job through the fault of a third party, and is therefore entitled to recover for pain and suffering from the third party, but is not entitled to compensation because he is not disabled and has not missed any work. These claimants are not entitled to compensation under the Act. Therefore, since the employer will not, and should not, acknowledge entitlement to compensation, the claimant has no election under the 1927 Act. The claimant's only alternative in this situation is to sue the third party in tort. While claimant was injured on the job, and is an employee,

v. Bethlehem Steel Corporation, 21 BRBS 49 (1988); *Castorina v. Lykes Brothers Steamship Company, Inc.*, 21 BRBS 136 (1988); *Anweiler v. Avondale Shipyards, Inc.*, 21 BRBS 271 (1988); *Armand v. American Marine Corporation*, 21 BRBS 305 (1988); *Fisher v. Todd Shipyards Corporation*, 21 BRBS 323 (1988); *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988); *Cunningham v. Kaiser Steel Corporation*, 21 BRBS 154 (ALJ, 1988); *Picinich v. Lockheed Shipbuilding*, 22 BRBS 289 (1989); *Glenn v. Todd Pacific Shipyards Corp.*, 22 BRBS 254 (ALJ, 1989); *Sellman v. I.T.O. Corporation of Baltimore*, 24 BRBS 11 (1990); *Cretan v. Bethlehem Steel Corporation*, 24 BRBS 35 (1990); *Reaux v. H & H Welders & Fabricating*, 24 BRBS 7 (ALJ, 1990).

application of Section 33(g) to this claimant would be illogical because why would Congress require that a claimant receive the employer's written approval of a settlement made with a third party when the employer has no exposure for the injury. Thus, the term "person entitled to compensation", even in 1927, clearly envisioned a class of claimants smaller than all employees injured on the job.

A second type of claimant would be a person who suffers a disabling injury on the job through the fault of a third party, and for whom the employer acknowledges liability under the Act. Just because the employer acknowledges liability, this does not affect the claimant's ability under the 1927 Act to elect his remedy. The claimant can elect to sue the third party, and collect compensation under 33(f) in excess of any settlement or judgment, or the claimant can elect to take the acknowledged compensation benefits, and automatically assign his rights against the third party to the employer. In this situation, where the employer has acknowledged liability, Section 33(g) applies. It is logical for Congress to require that the employer approve any settlement the claimant makes with a third party for less than the compensation due because in this case the employer faces exposure under 33(f) if the claimant settles for too little. Thus, 33(g) protects the employer from the risk that the claimant will take too small a settlement from the third party knowing that he can still collect the excess from the employer.

The more difficult situation is a third type of claimant who suffers a disabling injury on the job through the fault of a third person but whom the employer fails to acknowledge is disabled. The employer's refusal to acknowledge liability can be seen as a de-

facto election by the employer for the employee, because the employee is certainly not going to elect to receive compensation benefits from an employer who is refusing to pay. Thus, the employee is forced to elect to sue the third party, thereby foregoing his right to compensation. Is it logical for this claimant to be required to seek the approval of a third party settlement from the employer who has refused to acknowledge liability under the Act? Petitioner respectfully submits that it is not. Petitioner's position is buttressed by further examination of the 1927 Act.

As noted earlier, if the claimant elected to take compensation under the 1927 Act, this resulted in an automatic assignment of claimant's rights against the third party to the employer. Section 33(b), 44 Stat. 1440. Notably, this assignment of rights was based on claimant's "acceptance" of compensation, not "entitlement" to compensation. Acceptance of compensation benefits implies that either the compensation benefits were offered by the employer, or that the employer was judicially ordered to pay such benefits. Thus, acceptance of benefits necessarily must come after the claimant's right to benefits was acknowledged.

This Court has held that the Act is to be construed in order to further its purpose of compensating longshore and harbor workers. *Voris v. Eickel*, 346 U.S. 328, 333 (1953); *Northeast Marine Terminal Company, Inc. v. Caputo*, 432 U.S. 249, 268 (1977). The above interpretation fostered this purpose in the 1927 Act by protecting employers who acknowledged the injured worker's entitlement to compensation and afforded said claimants the opportunity to accept compensation in lieu of having to face the risks involved

in pursuing a lawsuit. 33(b) protected such employers by providing for an automatic assignment of the claimant's rights against a third party to employers who acknowledged claimant's entitlement under the Act. Such automatic assignment of rights was not provided to employers who had not acknowledged claimant's entitlement. Is it any less logical that the protection afforded by 33(g) would similarly be provided to employers who had acknowledged claimants entitlement, and not be provided to employers who had not acknowledged claimant's entitlement. By protecting such employers, Congress encouraged employers to accept their responsibility under the Act, thus furthering the intent of the Act.

As the above discussion shows, it is clearly more logical that the term "person entitled to compensation" under the 1927 Act was envisioned to mean a claimant whom the employer has acknowledged is disabled under the Act. When seen in this light, the interpretation under *O'Leary* and its progeny makes perfect sense, especially considering the extensive changes that have taken place in the Act since its original enactment.

As noted in Petitioner's Brief on the Merits (p. 11), Congress amended 33(a) in 1959 to get rid of the election process, recognizing the inequity of a statute that purported to give the employee an election, while actually giving a de-facto election to the employer.

> "...in exercising his right to sue a third party for damages under section 33 of existing law, the employee must choose whether to collect the compensation to which he is entitled or to pursue the third party suit. He may not pursue both courses.

> Existing law works a hardship on an employee by in effect forcing him to take compensation under the Act because of the risks involved in pursuing a lawsuit against a third party..."
>
> J.A. 7, p. 121.

With the excision of the election requirement, claimants no longer had to choose whether they were proceeding under tort or under the Act. Thus, it became increasingly more difficult to determine whether the employer had acknowledged entitlement under the Act. Before the excision, it was relatively easy to determine when employers were acknowledging liability under the Act because the claimant had to declare to the OWCP whether or not he was accepting compensation benefits. Now that claimants no longer had to make this election, the judiciary needed some way of determining when the employer had actually acknowledged claimant's entitlement under the Act so that the protection afforded by 33(g) could be enforced.

The judiciary resolved this problem by looking to when it could be certain that the employer had acknowledged the claimant's entitlement under the Act, i.e., when the employer was either actually paying compensation to the claimant, or had been judicially ordered to pay such compensation. Since that initial determination, the judiciary has been universal in its acceptance of this interpretation of 33(g). (See footnote 1).

5. The judiciary supports Petitioner's position.

Despite the universal acceptance of Petitioner's position, the Opposition Argument suggests that Petitioner's interpretation has no judicial support. In-

deed, Amicus NAS goes so far as to admit that the Director's Longshore Procedure Manual supports Petitioner's position, but then discounts the manual's interpretation as not expressing "either strong conviction or an immutable position", noting that the manual states "judicial interpretation may be necessary to resolve the issue". (Amicus NAS Br., p. 14).

If the sixteen years of Administrative Law Judges and Benefits Review Board decisions cited above are not sufficient enough of a judicial interpretation to satisfy Amicus NAS, then surely the Ninth Circuit decisions in *O'Leary v. Southeast Stevedore Company*, 622 F.2d 596 (9th Cir. 1980)(unpublished) and *Mobley v. Bethlehem Steel Corporation*, 920 F.2d 558 (9th Cir. 1990) and the Fifth Circuit decision in *Kahny v. Arrow Contractors of Jefferson, Inc.*, 729 F.2d 757 (5th Cir. 1984)(unpublished) should be sufficient. While the Opposition Argument notes that the Ninth Circuit's local rules do not recognize unpublished decisions as precedent, none of the opposition arguments can point to a Ninth Circuit decision which is contrary to *O'Leary* and *Mobley*. As for *Kahny*, the Fifth Circuit local rules do recognize unpublished decisions as precedent, and thus *Kahny* was precedent in the Fifth Circuit until overruled by the captioned matter. FRAP Loc. R. 47:5.3.

Furthermore, it has come to petitioner's attention that the United States Court of Appeals for the Fourth Circuit has recently come out with a decision that supports petitioner's position. In *ITO Corporation of Baltimore v. William Sellman; and Director, OWCP*, No. 90-1531 (January 22, 1992) (Supp. App. 2), William Sellman was injured while working on the vessel ALGENIB for ITO's predecessor. ITO voluntarily paid compensation benefits for total disability until July 21, 1984. At that time, ITO refused to make any further payments because Sellman had not transferred to ITO funds he received from a settlement of his third party suit.

In support of its decision to discontinue compensation benefits, ITO argued that the plain language of Section 33(g) requires that it discontinue compensation benefits because Mr. Sellman did not obtain ITO's written approval of the agreement. The Fourth Circuit noted that:

> "The purpose of Section 33(g) is to protect employer 'against his employee accepting too little for his cause of action against a third party'. In other words, the written approval requirement prevents the claimant from acting unilaterally to the detriment of the employer by accepting less in settlement than it might be entitled to and thus reducing the employer's offset.
>
> "We agree with claimant and the board that the purposes of Section 33(g) would be ill-served by permitting the termination of benefits where employer has directly insured, by its own action, the protection of its offset rights. In this case, ITO directly participated in the third party action against the ALGENIB defendants. . ."

The Fourth Circuit continued:

"Our holding that employer may not terminate benefit payments is not grounded in the view that employer is estopped to deny that it gave written approval in this case. Rather, employer's conduct in this case rendered Section 33(g) inapplicable. The language of the statute supports this con-

struction. Section 33(g) contemplates a situation where the person entitled to compensation reaches a settlement with a third party. This language reflects the concern alluded to earlier over unilateral action which is detrimental to the employer. Conspicuously, the statute contains no reference to written approval or notice requirements where the employer participates in the settlements. Accordingly, we conclude that written approval is unnecessary under such circumstances."

As petitioner noted in its brief on the merits (p. 5):

"Administrative Law Judge Parlen L. McKenna held that Section 933(g) did not preclude compensation benefits under the situation at bar; Nicklos' participation in the settlement agreements sufficed as notice under Section 33(g)(2) irrespective of the fact that Coward had not garnered Nicklos written approval."

Clearly, the fact situation in the case at bar, i.e., the participation of Nicklos in the settlement agreement between Cowart and Transco, is directly analogous to the Fourth Circuit decision in *Sellman, supra.* Thus, it is respectfully submitted that *Sellman* is Fourth Circuit precedent which supports petitioner's position that written approval is not necessary under 33(g) when the employer/carrier participates in the third party settlement agreement.

6. The legislative history is silent.

While discounting the sixteen years of judicial interpretation in accord with Petitioner's position as not being precedent, the Opposition Argument cites very little in support of its own interpretation. In support

of their position, all of the Opposition briefs cite as "legislative history" the Oversight Hearings before the Senate and the House of Representatives for the four years prior to the enactment of the 1984 amendments. These hearings were open to participation by all parties interested in the amendments to the Act, and are filled with statements issued by biased parties on both sides of the issue. Whatever impact these hearings may have had on the final enactment of the amendments in 1984 is unclear. Opposition Arguments surmise that because their position was advanced by certain parties during these hearings, than these statements were the impetus which propelled Congress to enact 33(g)(2) in its current form. The fact of the matter is that this "legislative history" cited by the Opposition Argument, is "legislative history" of amendments in 1981-1983, that were ultimately rejected by Congress. The true legislative history of the amendments passed in 1984 is silent as to the intent behind 33(g)(2). To suggest otherwise is misleading to this Court.

CONCLUSION

As the foregoing argument clearly demonstrates, Petitioner's interpretation of the language "person entitled to compensation" is the only logical interpretation from both a purely linguistic view, as well as from a historical view. The LHWCA has always been construed as social legislation to ensure that injured workers would get prompt relief from their employers. The interpretation propounded by Respondents and their Amicus, would lead to harsh results not intended by Congress. Indeed, Federal Respondent readily admits that the construction they

give 33(g) could lead to hardship for many claimants. (Fed. Resp. Br., pp. 34-36). Nevertheless, Federal Respondent feels that such difficulties do not justify a departure from the clear language of the statute. *Id.*

Petitioner respectfully submits that the clear language of the statute can, and has been, interpreted in a way which would not lead to harsh results for claimants. This construction, adopted by *O'Leary* and its progeny, is the only interpretation which makes sense to the overall scheme of the Act. The Fifth Circuits construction of 33(g) in the captioned matter cannot logically, historically, or morally stand.

Respectfully submitted,

LLOYD N. FRISCHHERTZ
SEELIG, COSSE', FRISCHHERTZ
& POULLIARD
1130 St. Charles Avenue
New Orleans, LA 70130
Telephone: (504) 523-1227

APPENDIX

Supplemental Appendix 1

9. **Consent.** Section 33(g)(1) of the Act requires the written approval of the employer for any settlement which is less than the amount to which the employee would be entitled to under the Act. If written approval is not received before the settlement, the employee's right to future compensation is terminated. Form LS-33 is used to obtain this written approval. However, written approval is only necessary when an employee is entitled to compensation. The term "entitled to compensation" has been interpreted to mean that the employee is being paid by the EC either voluntarily or pursuant to an award of compensation. If the employee is not receiving compensation, Section 33(g)(2) merely requires that the employee give the employer notice of the settlement. The issue of consent to a settlement can be a complex matter. Judicial interpretation may be necessary to resolve the issue. (See LHWCA CIRCULAR 86-03, 5-30-86)

Supplemental Appendix 2

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-1531

I.T.O. CORPORATION OF BALTIMORE,
Petitioner,

v.

WILLIAM SELLMAN; DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

SYLLABUS

The Fourth Circuit, concluding that written approval by employer of a third-party settlement was unnecessary where employer directly insured, by its own action, the protection of its offset rights, affirmed the Board's decision on this issue. Employer directly participated in the third-party action and fully participated in the negotiations leading to the execution of the settlement. Therefore, the court held that employer may not terminate benefit payments.

The court found that employer was entitled to an offset under Section 33(f), as the evidence did not support the conclusion that employer intended to waive its lien. Therefore, the court reversed the Board's holding to the contrary and held that employer was entitled to offset its liability against the third-party settlement recovery.

On Petition for Review of an Order
of the Benefits Review Board
(No. 87-1913)

Argued: April 10, 1991

Decided: January 22, 1992

Before RUSSELL, Circuit Judge, CHAPMAN, Senior Circuit
Judge, and WILLIAMS, United States District Judge for the
Eastern District of Virginia, sitting by designation.

ARGUED: Stan Musial Haynes, Rudolph Lee Rose, SEMMES, BOWEN & SEMMES, Baltimore, Maryland, for Petitioner, Joshua T. Gillelan, II, Office of the Solicitor, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Respondent Director; Paul David Bekman, ISRAELSON, SALSBURY, CLEMENTS & BEKMAN, Baltimore, Maryland, for Respondent Sellman. **ON BRIEF:** Robert P. Davis, Solicitor of Labor, Carol A. De Deo, Associate Solicitor, Janet R. Dunlop, Counsel for Longshore, Office of the Solicitor, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Respondent Director; Laurence A. Marder, ISRAELSON, SALSBURY, CLEMENTS & BEKMAN, Baltimore, Maryland, for Respondent Sellman.

RUSSELL, Circuit Judge:

This case arises out of a claim filed under the Longshore and Harbor Workers' Compensation Act. 33 U.S.C. §§ 901-950 (1986). Employer, I.T.O. Corporation of Baltimore ("I.T.O."), appeals from a decision of the Benefits Review Board ("Board") affirming an administrative law judge's (ALJ) decision denying I.T.O.'s request to terminate compensation and medical benefit payments or, alternatively, to offset its liability against settlement proceeds received by the claimant, William Sellman, through a third-party

settlement agreement. We agree with the Board that I.T.O. may not terminate benefit payments, but reverse its determination that I.T.O. is not entitled to an offset.

There is no dispute in this case concerning William Sellman's disability status. Sellman suffered a fall on July 10, 1979, while working on a ship known as the *Algenib* for I.T.O.'s predecessor, resulting in a fractured skull and paralysis. I.T.O. voluntarily paid compensation and medical benefits for total disability from July 11, 1979, until July 21, 1984. I.T.O. refused to make further payments after this date because Sellman refused to transfer to I.T.O. funds he received from a settlement of his third-party suit against the owners of the *Algenib*.

I.T.O., Sellman, and his wife[1] and children filed suit against the *Algenib* defendants in 1982 which culminated in two settlement agreements executed in June 1984. One agreement ("I.T.O. agreement") called for the payment of $250,000 to I.T.O. The agreement provided that it would have "no force and effect" until "the companion Settlement Agreement of the Sellmans is approved by the Circuit Court for Baltimore County ...." The I.T.O. agreement was signed by Mrs. Sellman, William's attorney, and the attorneys for I.T.O. and the *Algenib* defendants.

The second agreement ("Sellman agreement") required the *Algenib* defendants to pay $250,000 to the Sellmans in satisfaction of any claims against them. The Sellmans had filed nine causes of action against the *Algenib*, including one cause of action for loss of consortium. The Sellman agreement was signed by Mrs. Sellman, the Sellmans' attorney, Roger Smith, and the attorney for the *Algenib* defendants, Geoffrey Tobias. Like the I.T.O. agreement, the Sellman agreement was contingent upon approval by the Baltimore Circuit Court. Both agreements referenced I.T.O.'s alleged compensation lien. At the time

[1] Sellman's wife was appointed as his legal guardian in 1982.

the settlements were reached, I.T.O. had a lien of over one-half million dollars, which was growing at a rate of over $100,000 a year.

The provision requiring approval by the circuit court was requested by the ship owners, because Mr. Sellman was under guardianship protection and the Baltimore County Circuit Court was the court which had approved Mrs. Sellman as Mr. Sellman's legal guardian. Pursuant to this requirement of the settlement agreements, Mr. Smith drafted a Petition to Compromise Claim for submission to the Baltimore County Circuit Court. The Petition was drafted after the settlement agreements were executed and contained provisions which differed significantly from the provisions of the settlement agreements. Whereas the settlement agreements were silent as to whether I.T.O. had the right to suspend compensation payments, or to receive an offset against the proceeds of the Sellman settlement, the petition stated that I.T.O. had agreed to continue compensation and medical payments without interruption and that none of the proceeds of the Sellman agreement were subject to offset because they were intended solely to compensate Mrs. Sellman for loss of consortium. The petition submitted to the Baltimore County Circuit Court resulted in approval of the Sellman agreement.

In finding that I.T.O. was required to continue making both compensation and medical payments, the ALJ found that the petition was incorporated into the settlement agreements, and relied on this document and testamentary evidence to find that the parties in fact intended that I.T.O. continue making payments without interruption. The ALJ further found that the circumstances of this case obviated Mr. Sellman's responsibility under 33 U.S.C. § 933(g) to file a government form known as Form LS-33 reflecting I.T.O.'s written approval of its third-party settlement agreement. Finally, the ALJ determined that the

proceeds of the Sellman agreement were for loss of consortium and thus not subject to offset.

The Board unanimously upheld the ALJ's determination that I.T.O. was not entitled to terminate benefit payments. The Board reasoned that the requirement of section 33(g) that a claimant obtain employer's written approval of any settlement claimant reached with a third party was inapplicable where, as in this case, employer was both a party to the third-party suit and helped negotiate the settlement reached between claimant and the third-party. The Board noted that, in any event, I.T.O. would have no right to terminate medical benefit payments because the statute only permitted termination of medical benefits where claimant failed to either obtain employer's written approval of the settlement or notify employer of the settlement, and there was no question that I.T.O. received notice of the Sellman agreement.

A majority of the Board also affirmed the ALJ's finding that I.T.O. was not entitled to offset the proceeds of the Sellman agreement against its liability under the Act. The majority found that since the settlement agreements were ambiguous as to whether I.T.O. had waived its statutory right to an offset, the ALJ properly relied on extrinsic evidence to determine the intentions of the parties and that substantial evidence supported his findings regarding the intentions of the parties.

One Board member dissented from the majority's determination regarding the offset issue. The dissenting Board member felt that I.T.O. had the right to either collect the entire $500,000 paid by the *Algenib* defendants immediately or to receive a credit against its future liability by suspending payments until its full offset was realized. The dissent also took the position that the petition to compromise claim was a separate document from the settlement agreements whose only purpose was to request the circuit court to approve the Sellman agreement, and

that the circuit court's order did not approve the petition, but the Sellman agreement. Finally, the dissent argued that the ALJ's findings regarding the intention of the parties were not supported by substantial evidence because the ALJ had misconstrued relevant testimony.

Under 33 U.S.C. § 933(a), an employee entitled to compensation under the Act need not elect to pursue his worker's compensation claim to the exclusion of a negligence action against a third party. If, however, recovery is obtained from the third party, employer is entitled to offset its liability under the Act against such recovery pursuant to 33 U.S.C. § 933(f). Section 33(g), 33 U.S.C. § 933(g), deals with situations where the claimant settles his third-party action. That section provides, in pertinent part:

> If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

33 U.S.C. § 933(g)(1).

Subsection 2 of section 33(g) states the consequences for failing to obtain the employer's written approval:

> If no written approval of the settlement is obtained and filed as required by paragraph (1), or

> if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. § 933(g)(2).

In this appeal, I.T.O. argues that the Board erred by ignoring the plain language of the statute and pertinent case law in denying I.T.O. the right to terminate benefits. I.T.O. argues that since Mr. Sellman did not obtain I.T.O.'s written approval of the Sellman agreement and indisputably failed to file the required LS-33 form in a timely manner, the statute requires that benefit payments terminate. I.T.O. further contends that the Board erred by finding that its participation in the third-party action and settlement negotiations rendered section 33(g) inapplicable, relying on case authorities holding that section 33(g)'s written approval requirement is to be strictly enforced without exceptions. I.T.O. further relies on case authorities holding that the legislative history underlying the addition of subsection (2) and its termination provisions to section 33(g) indicate that its purpose was to preclude debate over whether an employer's conduct amounted to the equivalent of written approval and thus estopped it from denying that it had given written approval.

We find these arguments unpersuasive. The purpose of section 33(g) is to protect employer "against his employee accepting too little for his cause of action against a third party." *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 467 (1968); *Robinson Terminal Warehouse Corp. v. Adler*, 440 F.2d 1060, 1062 (4th Cir. 1971). In other words, the written approval requirement prevents the claimant from acting unilaterally to the detriment of the employer

by accepting less in settlement than it might be entitled to and thus reducing employer's offset.

We agree with claimant and the Board that the purposes of section 33(g) would be ill served by permitting the termination of benefits where employer has directly insured, by its own actions, the protection of its offset rights. In this case, I.T.O. directly participated in the third-party action against the *Algenib* defendants, and fully participated in the negotiations leading to the execution of "companion" settlement agreements which, as the Board stated, "were so intermeshed that they could be considered a joint settlement." After all this, and after accepting the settlement proceeds from the I.T.O. agreement, I.T.O. refused to give its written approval of the Sellman agreement.

Our holding that employer may not terminate benefit payments is not grounded in the view that employer is estopped to deny that it gave written approval in this case. Rather, employer's conduct in this case rendered section 33(g) inapplicable. The language of the statute supports this construction. Section 33(g) contemplates a situation where "the person entitled to compensation" reaches a settlement with a third party. This language reflects the concern alluded to earlier over unilateral action which is detrimental to the employer. Conspicuously, the statute contains no reference to written approval or notice requirements where the employer participates in the settlements.[2] Accordingly, we conclude that written approval is unnecessary under such circumstances.

We next address whether I.T.O. is entitled to an offset under section 33(f). The Board determined that a provision in the I.T.O. agreement stating that responsibility for sat-

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[2] We also agree with the Board that I.T.O.'s reliance on cases where the written approval requirement was upheld despite employer's participation in the third-party suit is misplaced since, in those cases, employer opposed the settlement.

isfaction of I.T.O.'s lien "remains with Mr. Sellman in the event that there is any recovery of any sums of money from any other party not named as a Defendant herein" could reasonably be interpreted as waiving I.T.O.'s right to offset the proceeds of Mr. Sellman's settlement with the *Algenib* defendants. The Board majority therefore concluded that the contract was ambiguous as to whether I.T.O. intended to waive its right to an offset, justifying circumvention of the parol evidence rule and permitting examination of extrinsic evidence, namely, the petition and the testimony of the attorneys involved in the case, to determine the intention of the parties. Even if we agreed with the Board's conclusion that the provision in the I.T.O. agreement was ambiguous, we find that the petition and relevant testimony do not support the conclusion that I.T.O. intended to waive its lien.

Initially, we agree with the dissenting Board member that the ALJ committed legal error in finding that the petition augmented the I.T.O. and Sellman agreements. The purpose of the petition was to obtain court approval of the *Sellman* agreement, and review of the petition and the circuit court's order discloses that this was the only result achieved. Paragraph 7 of the petition informed the court that the *Algenib* defendants, "in settlement of all claims of William H. Sellman, Jr.," offered a sum of $250,000. Paragraph 9 states that I.T.O. agreed to accept $250,000 in settlement of its claims against the *Algenib* defendants, and that I.T.O. will remain liable for all indemnity so that benefits "will not be interrupted." Paragraph 10 provides: "Rhoda Sellman, individually and on behalf of her minor children . . . under the loss of consortium claims . . . have also been negotiated and settled for the sum of [$250,000], *separate and apart from these proceedings*" (emphasis added).

The circuit court's order makes no reference to the matters contained in paragraphs 9 or 10. Rather, the court's order merely authorizes Mrs. Sellman and her attorneys

to accept the $250,000 offer of the *Algenib* defendants "in full settlement of all claims of William H. Sellman" arising out of his injuries on the ship. Thus, the court's order reflects the fact that the court had no reason or authority to approve paragraphs 9 and 10 of the petition. Moreover, we find it particularly unlikely that the court would have approved paragraph 10, since it referred to an agreement which does not appear to exist and since, in any event, the petition states that Rhoda's alleged settlement was "separate and apart from these proceedings." [3]

Once paragraphs 9 and 10 of the petition are removed from consideration, there is no documentary evidence indicating that I.T.O. intended to waive its right to an offset. In finding that I.T.O. intended to waive its lien, however, the ALJ also relied heavily on testimony by Mr. Tobias to the effect that the parties intended that benefit payments to Mr. Sellman would continue, despite the Sellman settlement, without interruption. The majority of the Board found that the ALJ acted within his discretion in determining which testamentary evidence to credit. We agree, however, with the dissenting Board member that the ALJ misconstrued the testimony of Mr. Tobias.

Mr. Tobias testified that it was his understanding that under the agreements benefit payments were to continue, and mentioned at one point in his testimony that in a discussion with Mr. Hennegan, I.T.O.'s attorney, at a cocktail party in October 1984, Hennegan agreed with him as to his understanding on this point. As pointed out by the dissent, Mr. Tobias later corrected his statement, testifying that "I do not think the words continuation of compensation payments were mentioned by either of us and if, I

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[3] We also reject William's contention that I.T.O. ought to be bound by the terms of the petition because it never objected to its provisions despite being sent a copy. I.T.O. was not a party to the guardianship proceeding before the circuit court, and had no duty to object to the contents of the petition.

think I may have suggested that, that if those words were expressed in the conversation, they certainly were not." Mr. Tobias further testified, more generally, that Mr. Hennegan never said anything to him about the continuation of payments. Even Sellman's attorney, Mr. Smith, conceded that the suspension of benefits was never discussed with I.T.O.'s representatives.

We note the Director's position that I.T.O. cannot recover its offset because at least some portion of the Sellman settlement proceeds must have been for loss of consortium by virtue of the fact that Mr. Sellman's family members were parties to the agreement, and I.T.O. failed to prove what portion of the proceeds were solely for William. We disagree. The Sellmans brought nine different causes of action against the *Algenib* defendants, only one of which was for loss of consortium. Since the Sellman agreement makes no attempt to match specific portions of the proceeds with specific causes of action, there is no way to determine what, if any, portion of the settlement was for loss of consortium. The Board has specifically upheld the employer's right to a total offset unless the settlement agreement specifically apportions the amounts intended for the claimant and the amounts intended for family members. *See Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989). To accept the Director's position would require this Court to rewrite the Sellman agreement, which we cannot do. *See Kasten Constr. Co., Inc. v. Rod Enters., Inc.*, 301 A.2d 12 (Md. 1973). *See also Automatic Retailers of Am., Inc. v. Evans Cigarette Serv. Co.*, 304 A.2d 581 (Md. 1973).

The Director also contends that I.T.O. is barred from recovering an offset because it indisputably waived its "lien" when it chose not to enforce its right to have the $250,000 in proceeds from the Sellman agreement transferred directly to itself. Instead, I.T.O. agreed to allow the funds to go to the Sellmans and simply ceased payments until its retained payments equaled the net value

of the settlement. The Director avers that the lien waiver is rendered illusory if it is held that I.T.O. waived its lien, but did not waive its right to a credit for the very amount it could have collected immediately.

Section 33(f) provides no basis for treating employer's right to an offset differently depending on the amount of time it takes to collect it. Moreover, an employer's decision to suspend benefit payments until it exhausts its credit provides claimants incentive to enter into a third-party settlement. By exercising its right to offset in this manner, employers alow the claimant to receive a large lump sum immediately rather than have the same funds disbursed to him in smaller increments over a period of time. This permits the claimant to use some of the funds to produce further income.

In cases where he claimant's third-party recovery exceeds employer's liability at the time of the recovery, the employer ceases benefit payments until such time as the claimant's continuing medical expenses exceed the amount of the third-party recovery. *See Shoemaker v. Schiavone and Sons, Inc.*, 20 BRBS 214 (1988). The only factor which distinguishes this case from those areas is that here I.T.O. could have collected the entire $250,000 immediately because the amount of its liability was known. We see no reason to penalize an employer for voluntarily collecting its offset over a period of time. Such a practice aids employers by encouraging claimants to pursue third-party recoveries, and aids claimants by permitting them to receive a lump sum which may be utilized to produce further income.

Accordingly, the decision of the Board is affirmed in part and reversed in part. I.T.O. may not terminate either compensation or medical benefit payments, but is entitled

to offset its liability against William's third-party settlement recovery.

AFFIRMED IN PART AND REVERSED IN PART